HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2) (b)

Description of the case.

W.P. No. 3042 of 2001
Rishi Ram Mishra
Versus
State of Uttaranchal & Others.

Approved for reporting.

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~~Not approved for reporting~~

Date of decision 13.7.2004

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 3042 of 2001 (S/S)

Rishi Ram Mishra ..... Petitioner

Versus

State of Uttaranchal & others ..... Respondents

Mr. Rakesh Thapliyal, learned counsel for the petitioner.
Learned Standing Counsel for the State.

Dated: 13 July, 2004

Hon'ble Rajesh Tandon, J.

By the present writ petition, the petitioners has prayed for the writ of mandamus directing the respondents to treat the petitioner to be promoted on class III post under Dying in Harness Rules w.e.f. the date when right to get Class III post was accrued in favour of the petitioner. A further prayer has been made in the writ petition for a writ of mandamus directing the respondents to decide the representation of the petitioner dated 17.3.2001.

Brief facts of the case according to the petitioner are that his father while in service died in the year 1982 and the petitioner was qualified to be appointed in Class III post, but at that time, the vacancy was not available in the department and on the assurance of the respondent, petitioner has taken the appointment in Class IV post.

The submission of the petitioner is that after the appointment in Class IV post, a regular vacancy of Class III post fell vacant, but the petitioner was not considered by the respondent for appointment in Class III post. Petitioner has further submitted that since the year 1982 to 1987 at least, 12 vacancies of Junior Clerk have fallen vacant, but the petitioner was not considered. Petitioner has stated in the writ petition that one Shri Kameswar Prasad Bachheti was appointed in Class IV post and after two years from the date of appointment of the petitioner, he was given Class III post under Dying in Harness Rules and as such, the action of the respondent is discriminatory.

Learned counsel for the petitioner has also referred that letter of the Soil Conservation Officer to the Deputy Director dated 1st post of Class III according to his seniority was considered and same was recommended to the Deputy Director for taking necessary action. The recommendation to the effect is quoted below:

> "bl dk;kZy; esa Hkh feJk dh fu;qfDr ds i'pkr vuqHko esa nks in rFkk dfu"V lgk;d ds ,d in ij fu;qfDr dh xbZA ijUrq Jh feJk ds vkosnu i= ij fopkj u djds mudks U;k;k ugha fn;k tk ldk] tks fd mudks fn;k tkuk Fkk D;kfd mudk vkosnu i= ls Li"V gS fd ;kX;rk ds vk/kkj ij in fjDr u gksus ds dkj.k fQygkyh esa>s prFkZ J.kh in gh fn;k tk;A
>
> vr% vuqjks/k gS fd Jh _f"kjke feJk dh fu;qfDr ds le; ;kX;rk ,oa l'kr prFkZ J.kh in gksus rFkk orZeku 'kS{kf.kd ;kX;rk b.Vj ehfM,V ij fopkjkijkUr esa bl fu"d"kZ ij igqapk gS fd Jh feJk dk dfu"V fyfid ds fdlh Hkh fjDr in vFkok vklu fjDr ds fo:} ik= ekuk gS, ofj"Brk dze esa inkUUfr inksUu djus dh dik djsA^^

Petitioner has also submitted a representation dated 17th March, 2001 stating therein that w.e.f. 1982 to 1987, 12 Junior Clerk were appointed ignoring the claim of the petitioner and also in the year 1984 a post of Draftsman and Junior Clerk fell vacant in the District, but his claim was again ignored by the respondent, but to which, the petitioner was deprived from Class III post.

It is settled law that so far as the compassionate appointment is concerned, no one has a right to get the appointment under Dying in Harness Rules and there cannot be insistence for a particular post as already held in the case the Director of Education (Secondary) Vs Pushpendra Kumar reported in 1998(5) SCC 192.

This case of Director of Education (Secondary) Vs. Pushpendra Kumar has also been relied upon in the case of State of Haryana &

another Vs Ankur Gupta reported in 2003(7) SCC 704. Relevant observation are quoted below:

> *"In Director of Education (Secondary) Vs Pushpendra Kumar it was observed that in the matter of compassionate appointment, there cannot be insistence for a particular post. Out of purely humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both ends meet, provisions are made for giving appointment to one of the dependants of the deceases who may be eligible for appointment. Care has, however, to be taken that provision for grant of compassionate employment which is in the nature of an exception to the general provisions does not unduly interfere with the right of those other persons who are eligible for appointment to seek appointment against the post which would have been available, but for the provision enabling appointment being made on compassionate grounds of the dependant of the deceased employee. As it is in the nature of exception to the general provisions, it cannot substitute the provisions to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision."*

Learned counsel for the petitioner has also relied upon the judgment in the case of Surya Kant Kadam Vs State of Karnataka & others reported in 2002 SCC (L&S) 1115, where the direction has been given by the Hon'ble Apex Court for consideration on the availability of the post. Relevant paragraph 2 of the said judgment is quoted below:

> *"The learned counsel for the appellant contended that even though Respondents No. 3 and 4 appointment could not be assailed on the ground of belated approach by the appellant but the prayer with regard to consideration of the appellant for the post of Sub-Inspector of Excise could not have been rejected by the Tribunal. The learned counsel appearing for the state*

Government, on the other hand, contended that against the earlier order when the Tribunal denied the relief of considering the case of the appellant for the post of Sub-Inspector of Excise, the appellant having not moved this court, the same has become final and therefore should not be interfered with by this court. There is some force in the aforesaid contention of the learned counsel for the State. But having considered the facts and circumstances of the present case and admittedly respondents No. 3 and 4, who were similarly situated like the appellant and who were given compassionate appointment later that the appellant, having been appointed as Sub-Inspector of Excise, the appellant has a justifiable grievance, it is true that the appointment on compassionate ground in the State of Karnataka is not governed by any statutory rules but by a set of administrative instructions and as such is not enforceable in a court of law. But the grounds on which the appellant makes out the case for consideration of his case is violation of Article 14 and discriminatory treatment meted out to the appellant. It is undisputed that the date on which the appellant was given a compassionate appointed as Second Division Assistant / Clerk he had the necessary qualification for being appointed as Sub-Inspector of Excise. It is also undisputed that respondents No. 3 and 4 were given appointment initially as Second Division Assistant/ Clerk but later than the appellant. When the State, therefore, thought it fit to change the post of respondents No.3 and 4 and appointed them to the post of Sub-Inspector of Excise, unless there is any justifiable reason existing, there is no reason as to why the appellant should be treated with hostile discrimination. In the aforesaid circumstances, we set aside the impugned order of the Tribunal rejecting the prayer of the appellant for being considered for the post of Sub-Inspector of Excise and we direct that the State Government may consider the case of appointment of the appellant as sub-Inspector of Excise. Be it stated, in the event he is appointed it would be

prosperity and he will not be entitled to any retrospective benefit. The appeals are allowed accordingly."

A counter affidavit has been filed in para 7 of which, it has been stated that Class III post was not vacant and when the same fell vacant in the year 1993, the petitioner has already been promoted on the Class III post.

From the averments made in the counter affidavit, it is evident that the petitioner has already been promoted on Class III post and as such, there cannot be any grievance to the petitioner. Since the petitioner was not qualified at the relevant time for Class III post, therefore, any promotion on Class III post cannot be made effective from the date, when the petitioner was appointed in Class IV post.

In view of the foregoing discussion, the writ petition is dismissed. No order as to costs.

(Rajesh Tandon, J.)

Dt. 13 July, 2004

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